(2)

No. 90-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

POWELL DUFFRYN TERMINALS INC.,
Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC.,
FRIENDS OF THE EARTH AND UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

**On Petition For Writ Of Certiorari
To The United States
Court Of Appeals For The Third Circuit**

BRIEF FOR RESPONDENTS PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. AND FRIENDS OF THE EARTH IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENTS, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. AND FRIENDS OF THE EARTH, HAVE STANDING TO MAINTAIN THIS CITIZEN SUIT UNDER SECTION 505 OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. 1365.

PARTIES TO THE PROCEEDINGS

Respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth are non-profit environmental organizations. Neither corporation has any parent or subsidiary corporations.

The United States Environmental Protection Agency is also a respondent.

Petitioner Powell Duffryn Terminals Inc. is a wholly owned subsidiary of Powell Duffryn plc.

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Respondents, Public Interest Research Group of New Jersey, Inc. and Friends of the Earth, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 913 F.2d 64.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in the petition (Pet. 2-3), the following portion of Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. 1365(g), is relevant:

> (g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

STATEMENT OF THE CASE

This is a citizen suit under Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. 1365. Petitioner seeks to have this Court review the court of appeals' conclusion that the respondent environmental groups established their standing to maintain this action.

1. Proceedings in the District Court

Petitioner filed a motion to dismiss the complaint under Rule 12 of the Federal Rules of Civil Procedure based on respondents' alleged lack of standing. In support of its motion, petitioner relied upon the deposition transcripts of the members of the respondent organizations upon whom respondents relied to establish their standing. Respondents submitted affidavits from those members. See Pet. App. O. Therefore, the district court treated petitioner's motion to dismiss as a motion for summary judgment under Rule 56. *SPIRG v. P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1081 (D.N.J. 1986).

The record below showed that petitioner discharged pollutants in violation of its National Pollutant Dis-

charge Elimination System/New Jersey Pollutant Discharge Elimination System (NPDES/NJPDES) permit into the Kill Van Kull (J.A. 2143-2217, 2915-3092, 3114-3368)[1] and that the Kill Van Kull is a tidal waterway which connects Newark Bay to the west with New York Bay to the east (J.A. 618). The record also showed that members of NJPIRG and Friends of the Earth have recreational, aesthetic and environmental interests in the Kill Van Kull and the related waterways of the New York Harbor Complex.

As the district court found, Cheryl Cummings, a member of NJPIRG, whose family home in Bayonne, New Jersey, is a mile from the Kill Van Kull, has used Kill Van Kull Park for biking and jogging for 19 years. 627 F. Supp. at 1081; Pet. App. 4o. Ms. Cummings testified that the pollution of the Kill Van Kull has diminished her enjoyment of the Park. *Ibid.* She described the water of the Kill Van Kull as having "a film" which is "sometimes like a rainbow or sometimes like greenish-yellow." 627 F. Supp. at 1082; J.A. 253. "The park is often not a pleasant place to be." 627 F. Supp. at 1081; Pet. App. 4o.

Sheldon Abrams, a member of Friends of the Earth, has noticed that the shores of the Kill Van Kull "are black and there is an oily sheen on the water" during his regular drives there. 627 F. Supp. at 1082; Pet. App. 1o. Mr. Abrams boats in Lower New York Bay, into which the Kill Van Kull flows. *Ibid.* He stated that he would enjoy boating in New York Bay more if the water flowing into it from the Kill Van Kull were cleaner, and that he would boat and fish in the Kill Van Kull itself if it were cleaner. *Ibid.*

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[1] "J.A." is a citation to the Joint Appendix filed by the parties in the court of appeals.

Andrew Gerbino, a member of Friends of the Earth, lives on the Staten Island side of the Kill Van Kull. 627 F. Supp. at 1082; Pet. App. 5o. He testified that the pollution of the Kill Van Kull and Lower New York Bay has decreased the value of his home. *Ibid.* Mr. Gerbino used to walk along the Staten Island side of the Kill Van Kull, but he no longer does because it is so polluted. 627 F. Supp. at 1082; J.A. 316-317. Mr. Gerbino also stated that he can no longer eat any crabs or clams caught in the area, although in the past "all these waters used to be used for lobster catching and clamming, crab catching. You don't see anyone doing that anymore." 627 F. Supp. at 1082; J.A. 319-320.

Douglas MacNeil, a member of Friends of the Earth, stated that he birdwatches in Kill Van Kull Park about five times a year, and hikes and birdwatches at the Global Marine Terminal and in Liberty Island State Park, both of which are on Upper New York Bay. Pet. App. 7o. Dr. MacNeil explained that his interests are affected by the condition of the waters of the Kill Van Kull because (J.A. 357):

> as a birdwatcher, which is my main recreational activity in this area, if the waters are a certain quality, there will be more or less wildlife. If there's more, then it's better for me.
>
> Besides that, if the waters are unappealing to me as an individual, it will inhibit me from using the area for birdwatching. In fact, it does. I don't come here as often as I might if I felt the water was better.

Mylissa VenDitti, a member of NJPIRG, testified that she has gone to Kill Van Kull Park, which is four blocks from her family home in Bayonne, all of her life. Pet. App. 3o. She has used the Park for tennis, jogging, bicycling and baseball. *Ibid.* She further stated that "the water in the Kill Van Kull looks polluted and greasy. It has garbage floating in it and is brown. On some days it smells. If the water were not polluted, I would swim in it." *Ibid.*

The district court denied petitioner's motion for summary judgment as to respondents' standing and concluded that respondents had established their standing as a matter of law. 627 F. Supp. at 1083. Petitioner then moved the court to certify the issue of standing for interlocutory appeal which the court declined to do. Pet. App. E.

The district court issued three orders finding petitioner liable for a total of 386 violations of its NPDES/NJPDES permit. 627 F. Supp. at 1090; Pet. App. E, 10e-11e; Pet. App. C. The case proceeded to trial on the issue of appropriate relief for petitioner's violations of the Act. In the Final Pretrial Order, the parties entered a stipulation under which defendant waived its right to cross-examine respondents' members on standing at trial and stipulated that the evidentiary basis for standing was unchanged since the district court's summary judgment decision. J.A. 615.

After trial, the district court imposed a civil penalty of $3.205 million on defendant and a permanent injunction against future violations of its permit. *PIRG v. Powell Duffryn Terminals Inc.*, 720 F. Supp..1158, 1166-1167, 1168 (D.N.J. 1989). In imposing the penalty and injunction, the district court found that petitioner's violations "were very serious in nature"

and that "some of defendant's effluent was toxic to marine organisms because defendant's violations involved toxic pollutants and pollutants with the potential to cause environmental harm to the waters." 720 F. Supp. at 1163. The district court further found that petitioner "was content to go on polluting the Kill Van Kull indefinitely" (720 F. Supp. at 1164) and that "defendant, motivated possibly by greed or apathy, chose to procrastinate" (*id.* at 1165). The district court also found that the maximum penalty which could be imposed against petitioner of $4.205 million should be reduced by $1 million because of the lack of diligence of the United States Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (DEP) in enforcing the water pollution control laws against petitioner. *Id.* at 1166-1167. Finally, the district court ordered that the penalty monies be paid to a trust fund for the improvement of the environment of New Jersey, rather than to the U.S. Treasury. *Id.* at 1168.

2. The Court of Appeals

Petitioner appealed the decision of the district court to the United States Court of Appeals for the Third Circuit on numerous grounds, including respondents' standing. Respondents cross-appealed the reduction of the civil penalty. EPA filed a notice of appeal in the district court and moved to intervene in the court of appeals in order to oppose the reduction of the civil penalty based on the conduct of itself and New Jersey DEP and to challenge the use of the penalty funds for environmental improvement projects in New Jersey. EPA was granted leave to intervene in the court of appeals. See Appendix 1 attached.

The court of appeals concluded that respondents had established their standing to maintain this action, based on the decision of this Court in *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). *Public Interest Research Group of New Jersey, Inc. and Friends of the Earth v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70-73 (3d Cir. 1990). Judge Aldisert wrote a concurring opinion to express "a nagging doubt" as to standing. *Id.* at 83-89.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Should Be Denied Because the Question Presented in the Petition Will Not Affect the Substantive Rights of the Parties

EPA is a party to this action as a result of being granted leave to intervene in the court of appeals.[2] See Appendix 1 attached. "When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978). See also 5 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1920, p. 488 (1986).

EPA, as the agency charged by Congress with enforcing the Water Act, without question has standing to maintain this action for civil penalties, declaratory

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[2] By a letter dated December 7, 1990, the Solicitor General informed this Court that because the only issue sought to be raised by petitioner is the standing of the environmental groups, EPA would not respond to the Petition for a Writ of Certiorari unless requested to do so by the Court.

and injunctive relief against petitioner.[3] So long as one of several plaintiffs in an action has standing, all may remain in an action. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, and n. 9 (1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976)(*per curiam*). Because EPA clearly has standing, this Court would not reach the issue which petitioner seeks to have reviewed.

Therefore, the question of whether respondents have standing to maintain this action, independent from EPA, will not affect the substantive rights of the parties. In these circumstances, the petition for a writ of certiorari should be denied. See *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. * * * Resolution [of the issue presented] here * * * can await a day when the issue is posed less abstractly").

2. The Petition Demonstrates No Conflict Between the Decision Below and Any Decision of this Court or Any Court of Appeals Decision

The petition argues broadly that the decision of the court of appeals in this case "is fundamentally inconsistent with this Court's application of Article III and the Constitution's limitation on the federal judi-

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[3] This Court has held that an intervenor may "continue a suit in the absence of the party on whose side intervention was permitted * * * [provided that the intervenor shows] that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986)(citing *Mine Workers v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338 (1945)).

cial power." Pet. 17. However, the petition includes no specific grounds on which the court of appeals' decision conflicts with any decision of this Court.[4] Thus, far from creating a " 'special exception' for environmental cases," as petitioner alleges (Pet. 19), the court of appeals applied the well-established law of this Court to the facts of the case before it.[5]

The decision below relies upon and applies the three requirements for Article III standing set forth in *Valley Forge Christian College v. Americans United, supra*, 454 U.S. at 472—injury, causality, and redressability. See 913 F.2d at 70-73. First, the court of appeals found that respondents had produced affidavits demonstrating injury to their "aesthetic and recreational interests [which were] sufficient to confer standing." 913 F.2d at 71 (citing *Sierra Club v. Mor-*

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[4] It is well established that organizations may bring suit on behalf of their members. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *International Union v. Brock*, 477 U.S. 274, 289 (1986). The petition makes no claim that the standards for organizational standing, apart from the standing of respondents' members, were not met here.

[5] Petitioner makes much of the concurring opinion, in which Judge Aldisert stated that he joined the majority in concluding that plaintiffs had established standing in spite of his own reservations that "constitutional standing is a serious question here." 913 F.2d at 85. See Pet. 12, 13, 16, 17, 18, 20, 22. The concurrence suggests that the majority relaxed the ordinary requirements of standing. 913 F.2d 84, 89. However, there is nothing in the majority opinion to support this suggestion. In addition, none of the decisions of other courts of appeals which have considered the showing necessary for standing under the Water Act (see pp. 11-12 below) gives any indication that traditional standing principles are being relaxed for Water Act cases.

ton, 405 U.S. 727, 735 (1972)). Petitioner does not challenge this holding.

Next, the court of appeals considered the "causation" requirement for standing, *i.e.*, whether respondents' injuries were "fairly traceable" to petitioner's illegal conduct. 913 F.2d at 71-73. Relying on *Valley Forge, supra*, 454 U.S. at 473, and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75, n. 20 (1978), the court of appeals rejected petitioner's claim that "plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." 913 F.2d at 72. Instead, the court of appeals held, quoting *Duke Power Co., supra*, 438 U.S. at 75, n. 20, that, in a citizen suit under the Water Act, plaintiffs must establish a " 'substantial likelihood' that defendant's conduct caused plaintiffs' harm." *Ibid.* In order to do this, the court of appeals said that plaintiffs must show (*ibid.*):

> that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest which is or may be adversely affected and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. (footnote omitted)

The court of appeals found that plaintiffs satisfied these requirements. *Ibid.*

Third, the court of appeals addressed the application of the redressability requirement to this case. 913 F.2d at 73. Plaintiffs sought and were granted

a permanent injunction against defendant's future violations of the Water Act and civil penalties. *Id.* at 81, 83. The court of appeals concluded that both aspects of relief would redress plaintiffs' injuries caused by defendant's contribution to the pollution of the Kill Van Kull (*id.* at 73):

> The purpose of the Act is to restore the chemical, physical and biological integrity of the nation's waters. Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part. If PDT complies with its permit, the pollution in the Kill Van Kull will decrease. Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III.
>
> There is also a connection between civil penalties and the injuries to PIRG's members. * * * The general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties. Penalties will deter both PDT specifically and other NPDES permit holders generally.

The court of appeals' decision is supported by this Court's statement in *Tull v. United States*, 481 U.S. 412, 422 (1987), that deterrence is one of the principal purposes in assessing civil penalties under the Water Act. In addition, every other circuit court which has considered the issue has come to the same conclusion as the court below. *Atlantic States Legal Foundation*

v. Tyson Foods, 897 F.2d 1128, 1136 (11th Cir. 1990)(civil penalties, even if payable only to the U.S. Treasury, deter future violations); *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695-696 (4th Cir. 1989)(appeal after remand in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987))(civil penalties for past violations are likely to redress a citizen-plaintiff's injury); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), certiorari denied, 109 S.Ct. 3185 (1989)(payment of civil penalties to the U.S. Treasury may deter future violations).

Finally, we note that the decision below is in full accord with the decisions of other courts of appeals which have considered the standing of citizen-plaintiffs under the Water Act. See, *e.g.*, *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985)(plaintiffs established standing by showing their members travelled near river into which defendant discharges, were offended by its appearance, picnicked along river and swam and fished in river); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984)(plaintiff established standing by showing that one or more of its members used the waters into which defendant discharged so that they would be affected by its pollution); *Sierra Club v. Simkins Industries, Inc.*, *supra*, 847 F.2d at 1112-1113, n. 3 (plaintiff established standing by showing that one of its members hiked along the river and had been "adversely affected physically, aesthetically and emotionally" by defendant's pollution). Petitioner does not even claim that any court of appeals decision conflicts with the decision below.

Since the decision below does not conflict with any decision of this Court or of another court of appeals, the petition for a writ of certiorari should be denied.

3. Neither the Decision Below nor the Record Raises the Question Presented in the Petition

The sole question presented in the petition is "whether the causation and redressability requirements of Article III [standing] may be relaxed in citizen suits under the Federal Water Pollution Control Act * * *." Pet. i. However, as shown above (pp. 8-12), the decision of the court of appeals does not "relax" the causation and redressability requirements for Article III standing. We will now show that the court of appeals correctly applied the law to the facts of this case.

a. Respondents Demonstrated a Causal Connection Between Their Injuries and Petitioner's Illegal Discharge of Pollutants

Petitioner claims that it produced "unrebutted" affidavit evidence "that it is not the cause of nor does it contribute to, the environmental injuries complained of by plaintiffs." Pet. 5. Petitioner misstates the record.[6]

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[6] Petitioner cites an interrogatory response by respondents in which they stated that they did not have information or expert reports regarding the impacts of defendant's pollutants on the Kill Van Kull or related waterways. Pet. 8. However, while respondents did not present an environmental impact assessment of the harm petitioner's violations caused to the receiving waters, based on their legal contention that the Water Act requires no such showing (33 U.S.C. 1251, 1311), respondents did present testimony and other evidence regarding the harm which the pollutants petitioner discharged in violation of its permit cause to human health, aquatic life and the marine environment. J.A.

The record is clear that the Kill Van Kull and the tidally related waters of Upper and Lower New York Bay are seriously polluted. 720 F. Supp. at 1167; J.A. 2473-2562, 2705-2709, 3730-3731. Petitioner admits that it discharges wastewater to the Kill Van Kull. Pet. 4-5. Respondents presented evidence that petitioner committed repeated violations of its NPDES/NJPDES permit. *SPIRG v. P.D. Oil & Chemical Storage, Inc., supra,* 627 F. Supp. at 1090; Pet. App. C, 2c-4c; Pet. App. E, 10e-11e. Thus, contrary to petitioner's claim, its repeated discharges of pollutants in excess of its permit limitations to the Kill Van Kull contributed to the polluted condition of that waterway and the other waterways to which it is tidally connected. Therefore, defendant contributed to the injury to plaintiffs' members caused by the polluted condition of these waterways.

Moreover, the record contains additional evidence to support respondents' claim that the injuries of their members are fairly traceable to petitioner's violations of the Water Act. The court of appeals cited the fact that respondents' members VenDitti, Abrams and Gerbino were injured by the oily appearance of the Kill Van Kull and that petitioner discharged excess oil and grease to the Kill Van Kull in violation of its NPDES/NJPDES permit. 913 F.2d at 73. In fact, petitioner committed 48 such violations. 720 F. Supp. at 1161. The testimony of petitioner's own water quality expert at trial showed that sediment in the area of the Kill Van Kull near defendant's outfall consistently contained considerably more oil than sediment

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1445-1463, 2473-2562, 2705-2709, 3376-3465, 3617-3701, 3725-3731, 3732-3747.

in other sites in the same waterway. J.A. 1983-1985. See also J.A. 1006.

Other evidence in the record shows a connection between defendant's violations and the harm cited by respondents' members. For example, member Gerbino testified that (J.A. 322):

> Q: [By Mr. Edelstein] Do you have any facts on which you base a statement that you have any interests adversely affected by this defendant's discharge?
>
> A: [By Mr. Gerbino] Yes, because I can't go crabbing and I can't go fishing and I can't eat the clams in the local waters— Of course I'm affected.
>
> Q: By this defendant's discharge?
>
> A: By all the discharges, yours included.
>
> Q: That's the basis of your participation in this lawsuit?
>
> A: Yes.

See also Pet. App. 0, 5o. Member Gerbino thus testified that his interest in the aquatic life in the Kill Van Kull and related waterways is harmed by petitioner's discharge of pollutants.

The district court found, based on evidence submitted by respondents (J.A. 3376-3465, 3617-3701, 3732-3747, 1445-1463), that many of the substances discharged by petitioner are harmful to aquatic life. For example, petitioner discharged excessive quantities of the toxic pollutants phenol and methylene

chloride (720 F. Supp. at 1161).[7] The district court further concluded that petitioner's BOD (biochemical oxygen demand) and COD (chemical oxygen demand) violations, which account for 161 of the 386 total violations, "deplet[e] the amount of oxygen available for use by fish and plants. Without adequate oxygen, fish and plants die * * *." *Ibid.*; see J.A. 1457-1459, 3644-3649, 3678-3688, 3737-3740. The district court found that TSS (total suspended solids) violations "can have an adverse affect on fish growth and reproduction and reduce the supply of food available to the fish." *Ibid.*; see J.A. 1459-1460, 3665-3670, 3697-3701, 3741-3742. Petitioner violated the TSS limits 66 times. 720 F. Supp. at 1161. The district court also noted that pH violations may have adverse physiological impacts on fish which "increase in severity as the degree of deviation [outside the acceptable range of 6.5 to 9.0 Standard Units] increases until lethal levels are reached." *Id.* at 1162; see J.A. 1461-1462, 3650-3659, 3689-3695, 3740-3741. Petitioner committed 63 pH violations. 720 F. Supp. at 1161. Thus, the record showed that petitioner's permit violations contributed to Mr. Gerbino's injury due to the loss of aquatic life in the Kill Van Kull and related waterways.

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[7] "Toxic pollutant" means "those pollutants or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring." 33 U.S.C. 1362(13).

Several members stated that they were offended by the color of the water in the Kill Van Kull which Ms. VenDitti described as "brown" (Pet. App. O, 3o), Mr. Gerbino described as "black-green" (Pet. App. O, 5o), and Mr. MacNeil described as "turbid and brown" (Pet. App. O, 7o). With respect to BOD violations, respondents' expert, Dr. Bruce Bell, testified at trial that (J.A. 1458):

> [T]he types of aquatic life we like to have in rivers, streams, lakes and so on are extremely sensitive to the level of dissolved oxygen. Oxygen dissolves very poorly in water, so there is a limited amount of oxygen available. If you use that up you essentially [kill] all the higher forms of life in the body of water and wind up with a [body] of water [i]n the worst case that is black and stinks.

Thus, the aesthetic injury respondents' members suffered is also related to petitioner's discharge.

As we have seen, taken as a whole, the record contains ample evidence that defendant's NPDES/NJPDES violations contributed to the injuries suffered by respondents' members. Petitioner suggests that the testimony of respondents' members themselves must establish all three aspects of the *Valley Forge* test for standing. See Pet. 8-13, 20-21. See also 913 F.2d at 87, 88 (concurring opinion). However, respondents are not limited to the affidavits and deposition testimony of their members in order to establish standing. The court may consider all of the relevant evidence in the record. See *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109, n. 22 (1978)(although standing was contested largely on the

pleadings, the Court considered admissions, answers to interrogatories and exhibits appended to the answers); see also *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 608 (1990)(standing " 'must affirmatively appear in the record' " (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). The record here fully supports the conclusion that respondents' injuries are fairly traceable to petitioner's excess discharge of pollutants to the Kill Van Kull.[8]

Finally, we note that this Court's recent decision in *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), supports respondents' standing in this case. There, as here, the defendant moved for summary judgment that plaintiffs did not have standing

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[8] Petitioner cites portions of the depositions of respondents' members which show that they did not have personal knowledge of the facts regarding petitioner's excessive discharge of pollutants to the Kill Van Kull. Pet. 9-13. Petitioner's counsel asked each of the deponents whether they would have been able to participate in this suit if a requirement of their participation was that they each had personal knowledge of petitioner's discharge of pollutants to the Kill Van Kull and an ability to connect the polluted conditions of which they complained in their affidavits to that discharge. See J.A. 246-252, 273-283, 318-323, 349-363, 412-435. On this basis, some of the deponents testified that they would not have agreed to participate in this suit because they lacked such information. See J.A. 246, 435. However, this testimony is not relevant to the issue of whether respondents adequately demonstrated their standing since there is no requirement that individual members of an organization have knowledge of all the facts necessary for standing. The evidence in the record, taken as a whole, not the knowledge of individual members, is the basis for determining whether standing has been established.

to challenge the governmental action at issue. *Id.* at 3188-3189. This Court held that (*id.* at 3189):

> [R]ule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.

In contrast, here, respondents' evidence specified the places used by their members and these locations were closely related to petitioner's discharge. Two of the five affiants live in the same city, Bayonne, New Jersey, in which petitioner's terminal is situated. Pet. App. O, 3o, 4o. Three of respondents' members recreate in the Kill Van Kull Park, which is situated on the Kill Van Kull, and is 1.8 miles downstream of petitioner's discharge point. Pet. App. O, 3o, 4o, 7o.[9] All of respondents' members used the lands alongside the Kill Van Kull or would have used the Kill Van Kull and related waterways into which petitioner discharged pollutants.

b. Respondents Demonstrated That Their Injuries Will Be Redressed by Injunctive Relief Prohibiting Petitioner's Illegal Discharge of Pollutants and Civil Penalties

Petitioner contends that (Pet. 17):

> The court of appeals also has applied new criteria for "redressability" under Article III in Clean Water Act cases. If the general

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[9] The Kill Van Kull is a tidal waterway. J.A. 1960-1961, 2477, 2516, 2559. Thus, wastewater discharged from petitioner's terminal flows east and west, depending on the direction of the tide. J.A. 1960-1961.

> "public interest in clean waterways will be served" by issuance of a penalty or injunction (16a), then plaintiffs need not prove that the "actual injury" identified by the individual members, on whom they rely for standing, will be redressed by "a favorable decision." *Valley Forge*, 454 U.S. at 472.

However, petitioner mischaracterizes the holding of the court of appeals regarding redressability. As we have seen (p. 11), the decision below held that injunctive relief would redress respondents' injuries, at least in part, because "[i]f PDT complies with its permit, the pollution in the Kill Van Kull will decrease." 913 F.2d at 73. The court of appeals also held that the imposition of civil penalties will accomplish both specific deterrence of petitioner and general deterrence of other polluters. *Ibid.* The court below proposed no new criteria for redressability or any other requirement for standing.

Petitioner's contention regarding redressability amounts to an assertion that unless all of the pollution in the Kill Van Kull could be eliminated by relief obtained against it, a single polluter, respondents' injury cannot be redressed by the imposition of a permanent injunction and/or civil penalties. This clearly is not the law. If petitioner were correct, all polluters would enjoy immunity from suit so long as they discharged into waters which were already heavily polluted. Further, since Article III of the Constitution applies to EPA and the states, as well as to citizens, no plaintiff could bring enforcement actions against polluters whenever it is impossible to eliminate all sources of pollution at once or to determine the exact harm each polluter has separately caused.

Petitioner relies on cases in which this Court has concluded that the traceability and redressability requirements for standing have not been satisfied because the chain of causation involved numerous third parties between defendant's conduct and plaintiffs' injury. Pet. 20-22. For example, in *Allen v. Wright*, 468 U.S. 737, 756-761 (1984), parents of black school children claimed that their children's diminished ability to receive the benefits of education in an integrated classroom was traceable to the failure of the IRS to fulfill its obligation to deny tax-exempt status to racially discriminatory schools. The Court found that the traceability and redressability requirements had not been met because the chain of causation between the alleged injury and the challenged government conduct was too attenuated. The ability to receive a desegregated public school education would depend not so much on whether the IRS denied tax-exempt status to a racially discriminatory private school, but on whether denial of that status would induce schools to change their policies or parents of children in such schools to transfer their children to public schools. *Id.* at 758. Similarly, in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-46 (1976), this Court found the causative chain too tenuous and speculative to support standing, where plaintiffs could not show more than a remote possibility that their injuries—denial of access for indigents to hospital services, allegedly caused by a change in tax policies—would be redressed in any way if their suit were successful. The Court stated that there was no basis for concluding that a court-ordered change in tax policies would result in a change in hospital practices to plaintiffs' benefit. *Id.* at 43. In these cases, third parties made it highly speculative that

defendant's conduct, rather than the independent action of third parties, caused the plaintiffs' injury and therefore that any remedy against the defendant would even ameliorate the injury to the plaintiffs.

In contrast, in the present case, there are no third parties in the causal chain. The links in that chain are petitioner's discharge, the receiving waters, and the interests in, and use of, those waters by respondents' members. Petitioner's discharges directly cause a portion of the harm to respondents' members. Similarly, the remedies obtained here, a permanent injunction against such excessive discharges and civil penalties, directly alleviate a portion of that harm.

* * *

Thus, the court of appeals correctly followed the well-established law of this Court. Petitioner can point to no specific holdings of the court below which are in conflict with any decisions of this Court. Instead, petitioner disputes the application of those legal principles to the particular facts of this case. Respondents submit that the court below correctly applied the law of standing. In any event, the application of correct principles of law to a particular factual situation does not raise issues for review by this Court.

CONCLUSION

For these reasons, respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

Dated: January 2, 1991

APPENDIX 1

APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 7, 1989

#D-47

No. 89-5831

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH

vs.

POWELL DUFFRYN TERMINALS INC., Appellant
(D.N.J. D.C. Civ. No. 84-00340)

Present: HIGGINBOTHAM MANSMANN and COWEN, *Circuit Judges*

Motion by United States Environmental Protection Agency to intervene or, in the alternative, consider motion as Petition for Mandamus

/s/ Nannette M. DeLong
Deputy Clerk 7-0485

Appellant's brief due 12-11-89.

ORDER

The foregoing motion by United States Environmental Protection Agency to intervene is GRANTED.

By the Court,

Dated: DEC 19 1989
DR/CC: BJT NME
KLM EL
LMK

/s/ A. Leon Higginbotham
Circuit Judge